Supreme Court, U.S.
FILED
DEC 11 2003

No. 03-870

IN THE

Supreme Court of the United States

SUSAN VICORY, *et al.*,

Petitioners,

v.

VERMILLION COUNTY, INDIANA and BOARD OF COMMISSIONERS OF VERMILLION COUNTY, INDIANA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Civil Rights Act provides that every person acting under color of State law, who deprives any citizen of rights, privileges or immunities protected by the Constitution and laws shall be liable to the injured party. 42 U.S.C. § 1983.

The Court of Appeals of Indiana held, however, that a County and its Board of Commissioners had no duty under 42 U.S.C. § 1983 to protect patients in a County owned hospital from an employee who was murdering patients at epidemic levels at the hospital over a period of two years, because the State does not owe a duty to protect an individual against private violence. The Court of Appeals also held that the County was not liable for the County Health Officer's failure to investigate the suspiciously high number of recurring deaths at the County owned hospital, and that the County had no direct duty to investigate and prevent the deaths occurring at the hospital. The Court concluded that the petitioners failed to assert a deprivation of constitutional rights necessary to maintain a claim under § 1983. Indiana's highest court, the Supreme Court of Indiana, denied transfer of the case, thus declining to review the decision of the Court of Appeals. Thus, the questions for review are:

1. Whether or not a County, and its Board of Commissioners, have any duty under 42 U.S.C. § 1983, as stated by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), to protect patients in a County owned hospital from an employee of the hospital who, for a period of two years, is murdering patients at the hospital at epidemic levels?

2. Whether or not a County, and its Board of Commissioners, have any duty under § 1983, as stated by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), and the federal courts of appeals, to protect patients at a County owned hospital under circumstances under which the County created a dangerous situation in the hospital or rendered its patients more vulnerable to danger?

3. Whether or not a County is liable under § 1983, as stated by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) and *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), and by federal courts of appeals, for its County Health Officer's failure to investigate suspiciously high numbers of recurring deaths occurring for a period of two years at the County Hospital, when the County Health Officer is a policymaker on matters of public health for the County?

4. Whether or not a County is liable under § 1983 for failure to perform its statutory duties under § 1983, as stated by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) and *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), to investigate, report, and prevent recurring suspicious deaths occurring at a County owned hospital at epidemic levels over a period of two years?

5. Whether or not petitioners have asserted a deprivation of constitutional rights necessary to maintain a claim under 42 U.S.C. § 1983 by demonstrating a deliberate indifference by the County, the Board of Commissioners, and the County Health Officer to the health needs and the lives of the patients at the County owned Vermillion County Hospital?

PARTIES TO THE PROCEEDING

There are no nongovernmental corporations involved in this case, which precludes the need for a corporate disclosure statement pursuant to Rule 29.6.

The following are petitioners in this proceeding, who are the eighty personal representatives of the estates of the seventy-six decedents in this case:

Susan Vicory
Veneta Benton
John Landsaw
Pearl Johnson
James Bratcher
Armand Gottardi
Claudia Haughee
Jack Barclay
Katherine Ahl
Helen Vastine
Junior Pressley, Jr.
Orville Hornbeck
Timothy L. Areson
Lawana Kraemer
Bill Pearman
Hazel Hale
John Rozsa
John Doran
Wayne Walton
Kathy Mason
Bryce Johnson
Russell Firestone, Jr.
Corletta Beard
Loretta Blackburn
Larry Roberts
Mildred Cook
John Richardson
David Wheeler
Hilda Simpson
Homer M. Garrigus
Penny Frink
Lela Natale
Mary Snyder
Rita Miller
Cheryl Lear
Marlene Stevenson
Richard C. Marshall, Jr.
Charles Catterson
Mildred Smith
Jerry Sims
Brenda L. Henderson
Orletta Welker
Phillip Pickett
Nellie Norman
Norman Miller
Robin Berg
Tom Alderson
Elizabeth L. Hiddle
Marilyn Whittington
Mary Hedden
Peggy Falls
Gloria McGill
Lorie Hickman
Evelyn M. Hobert

Norma Mae Siddens
Anthony R. Walters
Derek H. Maxwell, II
Kathryn M. Bricker
E. Neil Merritt
Roger Griffin
James Huxford
Mildred Genisio
Michael E. Gilman
Clinton S. Webb
Tanya Cottrell
Rebecca Battson
Robert Meadows
James A. Stillwell
Dom Rolando
Scott White
Sue Mershon
Lance Pefley
John Lee
James Lee
Rodney Myers
Marilyn J. Wolfe
Viola K. Chrimes
Bruce Hafner
Ethel F. Richardson
Malcolm Aukerman

The following are respondents in this case:

Vermillion County, Indiana
Board of Commissioners of Vermillion County, Indiana

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Indiana in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Indiana (per Baker, J., with Sullivan and Darden, JJ, concurring) affirming in part, reversing in part, and remanding for entry of summary judgment in favor of the respondents on all of petitioners' federal and state law claims is unpublished, other than the disposition table published at 790 N.E.2d 180 (Table) (Ind. App. 2003), and is reproduced in the Appendices (Pet. App.) hereto. Pet. App. 1a-25a. The Indiana Supreme Court's order denying transfer of jurisdiction (per Shepard, C.J.) is not published and is also reproduced in the Appendices. Pet. App. 39a-40a. The trial court's order (per Nardi, J.) denying respondents' second motion for summary judgment in part and granting in part, is unpublished and is reproduced in the Appendices. Pet. App. 29a-38a. The trial court's order (per Nardi, J.) denying respondents' first motion for summary judgment in part and granting in part, is unpublished and is reproduced in the Appendices. Pet. App. 26a-28a.

STATEMENT OF JURISDICTION

The Court of Appeals of Indiana entered its opinion on June 3, 2003. The Indiana Supreme Court denied transfer of jurisdiction on September 26, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

The statutory provision relevant to this petition is 42 U.S.C. § 1983, which states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Facts

This case arises as a result of over one hundred hospital patient deaths, characterized at epidemic death levels, which occurred over a period of approximately two years at a county owned hospital. The patient deaths resulted from murders committed by a nurse employee at the hospital, Nurse Orville

Lynn Majors. There is no comparable occurrence of epidemic hospital deaths in American history.[1]

Because of the rise in the mortality rate at the hospital during Majors' employment, a criminal investigation by the Indiana State Police began in March of 1995. The police completed their investigation in December of 1997, and filed charges against Majors. The investigation of the epidemic level mortality rate at the hospital's intensive care unit ultimately ended in Majors' conviction for murder. *Ling v. Stillwell*, 732 N.E.2d 1270, 1273 (Ind. App. 2000), *trans. denied*, 753 N.E.2d 3 (Ind. 2003) Majors was convicted of murdering six of the hospital patients, and is currently serving a 360 year prison sentence. In the criminal cases which resulted in the six convictions for murders, the investigators concluded that Majors killed these patients by injecting them with potassium chloride. *Majors v. State*, 773 N.E.2d 231, 234 (Ind. 2002)

Vermillion County Hospital (VCH) was a 62 bed facility in Clinton, Indiana, with an intensive care unit (ICU).[2] On February 1, 1993, VCH rehired a licensed practical nurse, Orville Lynn Majors, who worked in the ICU. VCH had previously terminated Majors on May 23, 1991, with a recommendation not to rehire him. Majors worked at VCH until March 31, 1995.

---

1. *See, e.g., The Washington Times*, Nurses, Multiple Killings Linked in Troubling Trend, December 7, 1998.

2. The exact location in the record below of the evidence supporting the facts in this portion of this Petition is shown in the Appendix at 41a-45a, which was Petitioners' Statement of Facts to both the Court of Appeals of Indiana and the Supreme Court of Indiana.

The death rate in the ICU at Vermillion County Hospital in the pre-Majors years of 1990, 1991 and 1992, was 29, 25, and 26, respectively. However, after Majors was rehired, the death rate increased to 101 for calendar year 1994. At the time the death rate increased to epidemic levels, the number of patients being admitted to the ICU was decreasing in comparison to prior years.

During the time period of May 1, 1993 to December 31, 1994, inpatient deaths at the hospital nearly doubled, and ICU deaths nearly quadrupled. The State survey shows that total deaths at the hospital were as follows: 1990-90; 1991-83; 1992-91; 1993-87; 1994-160.

After investigations began by the Indiana State Police, and the Indiana State Board of Health, a team investigating the deaths at VCH commissioned an independent epidemiology study, which was conducted by Dr. Steven Lamm, and called the Lamm study. Dr. Lamm concluded that the death rate increased so dramatically that it constituted an epidemic by July of 1994. Lamm's Study also indicated that during the epidemic period the deaths were almost all during shifts when Majors worked.

The Medical Services Committee of the county hospital was supposed to review the death charts. The County Health Officer, Dr. John Albrecht, also a member of the Medical Services Committee, was typically the only physician who attended the Service of Medicine Committee meetings. The County Health Officer necessarily had the same facts that Dr. Lamm later reviewed, showing that there was a mortality epidemic at Vermillion County Hospital.

In a survey of VCH conducted by the Indiana State Board of Health on April 5, 1995[3], the Indiana State Department of Health survey team found that the Service of Medicine Committee, of which County Health Officer Dr. Albrecht was the Chairman, was composed of three physicians, who never reviewed patient charts at all. Rather, they directed the nursing supervisor to review the death charts, and then present her findings to the Committee.

The County Health Officer, Dr. John Albrecht, was intimately involved in the day to day operations of Vermillion County Hospital. He leased office space from the hospital for about ten years after first coming to Clinton. He has been on the hospital staff the entire time he had been Vermillion County Health Officer; staff since 1984, Vermillion County Health Officer since 1988. He had served as Chief of the Medical Staff and had chaired the Medical Executive Committee, the Service of Medicine Committee, and the Pharmacy and Therapeutics Committee, and had been on the Utilization Review Committee and Records Committee. No one ever told him to forget as County Health Officer what he learned on any of the committees. His role as County Health Officer included giving attention to any epidemic death rate due to communicable disease.

B. Proceedings Below

Petitioners are the surviving next of kin or the duly appointed and acting personal representatives of patients who died under suspicious circumstances in the Vermillion County Hospital, who were under the care of nurse Orville Lynn Majors. Petitioners filed the lawsuit against Vermillion

3. The survey revealed information pertaining to the death rate at the hospital, as well as questionable practices with respect to death charts of individuals. *Ling v. Stillwell*, 732 N.E.2d 1270, 1273 (Ind. App. 2000), *trans. denied*, 753 N.E.2d 3 (Ind. 2003)

County, Indiana, the Board of Commissioners of Vermillion County, Indiana, Vermillion County Hospital, the Board of Trustees of Vermillion County Hospital, former administrator John Ling, Jr., nurse Orville Lynn Majors, and Dr. John Albrecht, individually and in his capacity as Vermillion County Health Officer. Petitioners' complaints were filed in the Vermillion Circuit Court, and were amended numerous times to add additional plaintiffs.

Plaintiffs' complaints were based upon violations of civil rights, negligence, and gross negligence. Petitioners first alleged an action under 42 U.S.C. § 1983 in their Second Amended Complaint, filed in the Vermillion Circuit Court on April 9, 1996. Petitioners alleged that respondents were acting under color of state law, and denied the patients' rights under state and federal law and the Constitutions of Indiana and the United States, including the rights to life and liberty. Petitioners also alleged that the court has jurisdiction under 42 U.S.C. § 1983, 28 U.S.C. § 1331, 28 U.S.C. § 1343, and the Fifth and Fourteenth Amendments to the United States Constitution. Petitioners alleged that respondents "engaged in conduct which demonstrates deliberate indifference by failing to provide adequate protection to the plaintiffs and their decedents and, as state actors, the defendants were recklessly indifferent, grossly negligent or deliberately or intentionally indifferent." (Second Amended Complaint, Count I, paragraph 12) Additionally, Petitioners alleged that "[t]he defendants were consciously indifferent to the risks that the plaintiffs' decedents would be killed or would die in the hospital and are therefor (*sic*) liable under Federal law for a violation of the civil rights of the plaintiffs." (Second Amended Complaint, Count I, paragraph 14) Petitioners further alleged that

> [a]s a direct and proximate result of the above conduct by the defendants, the plaintiffs and all those similarly situated were injured and damaged

> and their rights to equal protection of the laws, their rights to due process of law their life and liberty and their property rights were violated, injured and damaged.

(Second Amended Complaint, Count I, paragraph 15).

These civil rights violations were alleged in all subsequent amended complaints. In the Ninth Amended Complaint, Petitioners alleged that the Vermillion County Health Officer, Dr. John Albrecht,

> was a county official engaged in making policies for Vermillion County Indiana and the remaining Defendants were acting under color of law in the operation of a county-owned hospital which was established and operated pursuant to Indiana law. . . . The actions of the Defendants constituted willful, intentional, deliberate and conscious indifference to and disregard of the constitutional rights of the plaintiffs' decedents and their surviving next of kin, in that they deprived them of their lives and the right to associate with their families.

(Ninth Amended Complaint, Count III, paragraph 2) "The above actions by the defendants constitute a violation of 42 U.S.C. § 1983. . . ." (Ninth Amended Complaint, Count III, paragraph 3) These allegations were also included in the Tenth Amended Complaint.

On March 23, 2000, the trial court denied the first Motion for Summary Judgment Filed by Defendant Vermillion County and the Commissioners of Vermillion County, in all regards, including the § 1983 issues, except on the issue of punitive damages, which was granted. Pet. App. 26a-28a.

On September 22, 2000, Vermillion County, Indiana, and the Commissioners of Vermillion County, Indiana, filed their Second Motion for Summary Judgment and Memorandum in Support of Second Motion for Summary Judgment. Once again, the issue of liability under 42 U.S.C. § 1983 was raised.

C. Disposition by the Courts Below

As shown above, the Court denied Defendants' first Motion for Summary Judgment as to the § 1983 issues on March 23, 2000. Pet. App. 26a-28a.

On January 9, 2002, the trial court denied Vermillion County's Second Motion for Summary Judgment. Relevant to the issues before us, the Court held:

> 11. In summary, the Court's original conclusions in regard to the matter of summary judgment on the plaintiffs' Section 1983 claims remain the same. The Court agrees that *Monell v. Dept. of Social Services* 436 U.S. 658, 98 S. Ct. 2018 (1978) stands for the proposition that the county cannot be held liable for the acts of a lower-level employee on a theory of respondeat superior. However, the county can be liable for conduct officially sanctioned by municipal actors or policy-makers through direct action or custom. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986). Thus the actions of the county executive and the county health officer in causing the damages claimed by the plaintiffs present genuine issues in this case.
>
> 12. For all of these reasons, the Court again finds that genuine issues fact exist in regard to the claims made by the plaintiffs under 42 U.S.C.

> Section 1983 and that the county defendants are not entitled to judgment as a matter of law. The Court denies the Second Motion for Summary Judgment in regard to the plaintiffs' claims under 42 U.S.C. § 1983.
>
> * * * *
>
> For all of these reasons, the Court now reaffirms those portions of its Order of March 23, 2000, which are not inconsistent with this Order.

Pet. App. 33a, 34a, 37a.

Thus, the Court again denied the second summary judgment motion as to the § 1983 issues.

Vermillion County, Indiana, and the Commissioners of Vermillion County, Indiana, appealed the ruling of the trial court to the Court of Appeals of Indiana.

On June 3, 2003, the Court of Appeals of Indiana, (Baker, J.) issued its written Memorandum Decision-Not for Publication. Pet. App. 1a-25a. The Court of Appeals affirmed in part, reversed in part, and remanded the judgment of the trial court for entry of summary judgment in favor of Vermillion County, Indiana, and the Commissioners of Vermillion County Indiana on all of petitioners' state and federal law claims.

The Court of Appeals held that the County defendants were entitled to summary judgment on the § 1983 claims, in that the State does not have a duty to protect an individual from private violence. Pet. App. 4a-9a. The Court also held that the County defendants are not liable for the County Health Officer's failure to investigate the suspiciously high number of deaths at Vermillion County Hospital. Pet. App. 19a-22a. Additionally, the Court held that the County

defendants had no direct duty to investigate and prevent the deaths occurring at Vermillion County Hospital, by concluding, as a matter of law, that the governing board, not the County Defendants, were responsible for the general operation and control of the hospital. Pet. App. 22a-23a. The Court concluded that petitioners failed to assert a deprivation of constitutional rights necessary to maintain a § 1983 claim. Pet. App. 24a.

On June 23, 2003, the petitioners filed their Petition to Transfer of Appellees with the Indiana Supreme Court, on the basis that the decision of the Indiana Court of Appeals was in conflict with decisions of the United States Supreme Court and the United States Courts of Appeal regarding the § 1983 issues.

On September 26, 2003, the Indiana Supreme Court (Shepard, C.J.) denied petitioners' petition to transfer jurisdiction, thus declining to review the decision of the Court of Appeals of Indiana. Pet. App. 39a-40a.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The Petition should be granted, both because the Court of Appeals of Indiana has decided an important federal question in a way that conflicts with decisions of the United States Supreme Court, and with decisions of the United States Courts of Appeals.

I. The Court Of Appeals of Indiana Has Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions of the United States Supreme Court.

A. The *DeShaney* Rule Regarding Acts Of Private Violence Is Inapplicable To The Present Case

The trial court correctly concluded that the "issue in this case is the alleged failure of the county defendants to comply with Indiana law and administrative rules and regulations and not with the enforcement of law against third parties," Pet. App. 35a, ¶ 16, which correctly framed the issues, and was the correct ruling under *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). However, without authority, the Court of Appeals of Indiana negated the statutory duties of the County defendants cited by the trial court by holding that the victims in this case allege only a failure to protect private individuals against private violence.

The Court of Appeals of Indiana did not apply *Pembaur*, but incorrectly premised its holding on *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and related opinions "that a State's failure to protect an individual against *private* violence simply does not constitute a violation of the Due Process Clause." Pet. App. 7a (emphasis supplied). In the instant case, an employee of the County owned hospital murdered patients in the hospital,

and the murders recurred, because the County defendants did not perform their statutory duties, even when the Vermillion County Health Officer and the hospital staff were aware of the epidemic increase in deaths.

Decisions cited by the Court of Appeals involve singular acts of violence in a private setting. In stark contrast, in the instant case, a government official[4] ignored a course of conduct spanning approximately two years, in a public setting, in a County Hospital, resulting in over one hundred deaths, at an epidemic level. *DeShaney*, *supra*, is factually distinguishable from the instant case in that *DeShaney* involved a private citizen being victimized by another private citizen. The result of the decision of the Court of Appeals of Indiana is to allow governmental officials to ignore or refuse to comply with their statutory duties to protect the citizens of the State, and the public health, under even the gravest of circumstances, under the guise that they have no duty to protect private citizens from one another.

DeShaney is also inapplicable to the instant case in that the child was returned to his father and faced the same dangers that he had faced previously. As stated by the Sixth Circuit in *Cartwright v. City of Marine City*, 336 F.3d 487 (6th Cir. 2003): "The question is not whether the victim was safer *during* the state action, but whether he was safer *before* the state action than he was *after* it." In the instant case, the patients, by being admitted to the Vermillion County

4. The statutory duties of the County Health Officer included taking all necessary actions to protect the public health, Ind. Code § 16-20-1-23(a) (2003), to abate wrongful health conditions within his jurisdiction, I.C. § 16-20-1-25(a) (2003), to collect, record, and report all deaths within the county to the state department of health, I.C. § 16-20-1-17(2003), to "enforce the health laws, ordinances, orders, rules and regulations. . . ." I.C. § 16-20-1-19 (2003), and by virtue of his position on the Service of Medicine Committee at the county hospital, to *review* the death charts and records.

Hospital, were *placed* in danger in a county owned hospital where murders of patients were occurring, not being returned to a pre-existing danger in a private setting.

The Court of Appeals should have applied *Pembaur*, not *DeShaney*.

B. Liability May Be Imposed For A Single Decision By Governmental Policymakers

The Court of Appeals of Indiana again failed to follow the pertinent line of cases decided by the United States Supreme Court, including *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). *Pembaur* held that liability may be imposed for even a single decision by governmental policymakers, under appropriate circumstances, that is, if the decision to adopt a particular course of action is directed by those who establish governmental policy. *Id.* at 477-81.

In *Pembaur*, the County Prosecutor was acting as the final decision maker for the County in the critical area of inquiry, and was liable under § 1983. *Id.* at 483-85. In the present case, the Vermillion County Health Officer[5] was acting as the final decision maker for the County for matters of public health, and chose to ignore the epidemic increase in the death rate at the County owned hospital.

The Court of Appeals of Indiana cited and quoted *DeShaney*, *supra*, for the proposition that a State's failure to

5. The County Health Officer had the statutory duty to take all necessary actions to protect the public health, I.C. § 16-20-1-23(a) (2003), to abate wrongful health conditions within his jurisdiction, I.C. § 16-20-1-25(a) (2003), to collect, record, and report all deaths within the county to the state department of health, I.C. § 16-20-1-17 (2003), and by virtue of his position on the Service of Medicine Committee at the county hospital, to *review* the death charts and records.

protect an individual against private violence doesn't constitute a violation of the due process clause. However, *Pembaur*, *supra*, holds that liability may be imposed for decisions by governmental policymakers if the decision to adopt a course of conduct is directed by those who establish governmental policy. *Pembaur*, *supra*, 475 U.S. 469, 477-81 (1986). Here, the County Health Officer had the statutory duty to "abate wrongful health conditions within his jurisdiction,"[6] to take all necessary action to protect the public health,[7] to enforce the health laws and regulations[8], and, by virtue of his position on the Service of Medicine Committee, to review the death charts and records. Thus, the trial court below correctly concluded that the actions of the Commissioners, as county executive[9], and the County Health Officer, made them the policymakers and decision makers for the County for these critical public health care issues. Pet. App. 32a-33a, ¶¶ 8-12. The Court of Appeals should have applied *Pembaur*, not *DeShaney*.

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6. I.C. § 16-20-1-25(a) (2003).

7. I.C. § 16-20-1-23(a) (2003).

8. I.C. § 16-20-1-19 (2003).

9. The Commissioners are the county executive of Vermillion County. Ind. Code § 8-22-1-7 (2003). The health department is mandated to operate as *an agency of local government*, and is administratively responsible to the appropriate county or city executive. Ind. Code § 16-20-1-2 (2003) (emphasis added). "The health officer is the *executive officer* of the local health department and shall serve as secretary of the local board of health." Ind. Code § 16-20-2-16(d) (2003) (emphasis added).

C. A County Can Be Liable Where It Causes The Constitutional Deprivation At Issue

The decision of the Court of Appeals is also contrary to the United States Supreme Court decisions such as *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). In *Monell*, the United States Supreme Court held that a county can be liable under § 1983 where it causes the constitutional deprivation at issue. It is where the execution of the governmental policy or custom inflicts a constitutional injury that the municipality or county can be held liable. It is clear that the Court intended municipal liability to attach where official municipal policy of some type causes the infliction of an injury of constitutional significance.

The requirement that the deprivation be due to "official policy" was intended to distinguish acts of the municipality from acts of low-level employees. This was designed to make it clear that only where the action is fairly construed to be the official act of the municipality or its policy-makers should liability attach.

Thus, recovery under § 1983 is limited to situations where municipal actors or policy-makers have officially sanctioned the conduct. *See Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The official acts of a municipality include those of officials whose acts or edicts may fairly be said to represent official policy. When the execution of that policy or custom results in deprivation of citizens' rights and privileges, the municipality is liable under § 1983. *See also Tapia v. City of Greenwood*, 965 F.2d 336, 338 (7th Cir. 1992); *Patrick v. Jasper County*, 901 F.2d 561, 565 (7th Cir. 1990).

The Indiana legislative scheme, as set forth below, clearly demonstrates that the County Health Officer, county commissioners, the hospital governing board, and the

administrator were the persons who were responsible for the establishment of policies and procedures to provide for quality assurance. The defendants are the ultimate policy-makers under *Monell* on the issue of operating procedures in the hospital. It was their ultimate responsibility to establish bylaws and policies to ensure that review of patient records for morbidity and mortality would take place in the instant case. As the Indiana State Board of Health concluded, no meaningful review of patient records took place, resulting in the continuing deaths of over one hundred patients over a two year period.

The Commissioners are the county executive of Vermillion County. Ind. Code § 8-22-1-7 (2003). The health department is mandated to operate as *an agency of local government*, and is administratively responsible to the appropriate county or city executive. Ind. Code § 16-20-1-2 (2003) (emphasis added). "The health officer is the *executive officer* of the local health department and shall serve as secretary of the local board of health." Ind. Code § 16-20-2-16(d) (2003) (emphasis added).

The duties of the County Health Officer are also established by statutory mandate.[10] The County Health Officer *has the duty to collect, record and report the vital statistics for the county, including all deaths, and is responsible for forwarding the records to the state department of health.* Ind. Code § 16-20-1-17 (2003) (emphasis added).[11] The County Health Officer is authorized to inspect property and *take all necessary action to protect the public health.* Ind. Code § 16-20-1-23(a) (2003) (emphasis added).

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10. Moreover, under Indiana law, statutes governing the health officer apply generally to promote public health and welfare. *Steele v. Campbell*, 118 Ind. App. 549, 82 N.E.2d 274, 275 (1948).

11. In addition, the County Health Officer is directed to "enforce the health laws, ordinances, orders, rules and regulations. . . ." Ind. Code § 16-20-1-19 (2003).

The County Health Officer also has a clear duty to abate an unlawful condition within his jurisdiction and may seek legal enforcement of these powers. Ind. Code § 16-20-1-25(a) (2003) states that "[a] person shall not institute, permit, or maintain any conditions that may transmit, generate, or promote disease." The statute concludes with the following words: "If the action concerning public health is a criminal offense, a law enforcement authority with jurisdiction over the place where the offense occurred shall be notified." Ind. Code § 16-20-1-25(c) (2003). This statute applies, not only to the spread of disease, but also to matters concerning public health that are criminal offenses. Obviously, the statutory duties of prevention and abatement of the County Health Officer would apply to multiple recurring homicides at an epidemic level at a county owned hospital, such as in the instant case.

County hospitals, such as Vermillion County Hospital, are created by statute, which also provide for procedures and policies to be followed by the County and its delegated representatives in carrying out such matters. County hospitals must be established by the County Executive, Ind. Code § 16-22-2-1 (2003), that is, as shown above, the County Commissioners. I.C. § 8-22-1-7.

The medical staff of the hospital is responsible to the governing board for the clinical and scientific work of the hospital. The board is to receive advice from the medical staff regarding professional matters, and policies, and for review of professional practices in the hospital *for the purpose of reducing morbidity and mortality* and for the improvement of the care of patients in the hospital, including the quality and necessity of care provided and the *preventability of complications and deaths in the hospital. See* Ind. Code § 16-21-2-7 (2003) (emphasis added).[12]

12. Again, the County Health Officer was directed by statute to enforce these health laws. I.C. § 16-20-1-19 (2003).

These statutory duties, for which the County Commissioners are ultimately responsible, are further described in the Indiana Administrative Code, which establishes numerous dictates regarding the operation of county hospitals. Ind. Code § 16-21-1 (2003) *et seq.* provides legislative authority and basis for the promulgation of a number of operational regulatory requirements. Ind. Admin. Code tit. 410, r. 15-1.2-1(d) (2003) *requires the reporting of unusual occurrences in the hospital.* Further, the hospital is required by Section 1(d) to have a plan to address the internal review and *reporting of unusual occurrences.*[13]

In addition, the provisions of Ind. Admin. Code tit. 410, r. 15-1.4-1 (2003) require the governing board (and thus the County Commissioners) to be responsible for the medical staff. The board must "ensure that the medical staff is accountable and responsible to the governing board for the quality of care provided to patients." 410 IAC 15-1.4-1(b)(4)

Finally, Dr. Albrecht was authorized, and obligated, as Vermillion County Health Officer, to review the deaths at Vermillion County Hospital by using the information obtained from the death certificates.

Thus, the trial court correctly applied *Monell*, and concluded that the County Commissioners, as the county executive, as well as the County Health Officer, were governmental actors or policymakers for the Vermillion County Hospital on these critical public health matters. Pet. App. 33a, ¶ 11. The Court of Appeals of Indiana should have applied *Monell.*

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13. Once again, the County Health Officer is directed by statute to enforce these health regulations. I.C. § 16-20-1-19 (2003).

II. The Court Of Appeals Of Indiana Has Decided An Important Federal Question In A Way That Conflicts With Decisions Of The United States Courts Of Appeal.

A. Even If The *DeShaney* Rule Were Applicable, The Exception Would Apply Because The Respondents Created A Dangerous Situation And Caused The Patients To Be More Vulnerable to Danger

A case decided in the Third Circuit conflicts with the decision of the Court of Appeals of Indiana, and supports petitioners' position that *DeShaney* is inapplicable to the facts of this case. In *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3d Cir. 1989), *reh'g denied*, *cert. denied*, 493 U.S. 1044 (1990), a student brought a civil rights action against the school district, the principal, assistant principal, and the superintendent after an alleged sexual assault by a teacher. The Appellate Court's discussion and distinguishing of *DeShaney* as it pertains to private third parties is applicable and strikingly similar to the instant case. The Court explained:

> Unlike DeShaney's father, who was referred to throughout the *DeShaney* opinion as a private third party, *Wright was a school district employee*[14] *subject to defendants' immediate control*. In fact, many of Wright's interactions with Stoneking occurred in the course of his performance of his official responsibilities, such as during school-sponsored events and trips, and sometimes on school property.

Id. at 724.

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14. Likewise, in the instant case, Nurse Orville Lynn Majors was an employee of a county hospital. The County Health Officer, Dr. John Albrecht, was an employee of the County.

Thus, the fact situation in *Stoneking* is analogous to the instant case. Nurse Orville Lynn Majors, unlike DeShaney's father, was not a private third party. Majors was an employee of the county owned hospital, subject to the ultimate control of the County and the County Commissioners. The County Health Officer was not a private party. As in *Stoneking*, Majors' actions occurred in the course of his performance as an employee of Vermillion County Hospital, and Albrecht, as an employee of the County. Additionally, like the defendants in *Stoneking*, the County and Board of Commissioners were incontestably acting under color of state law.

Stoneking also states: "Nothing in *DeShaney* suggests that state officials may escape liability arising from their policies maintained in deliberate indifference to actions taken by their subordinates." *Id.* at 725. This was twice the ruling of the trial court in the instant case, *i.e.*, Vermillion County and the Commissioners of Vermillion County may not escape liability arising from their policies maintained in deliberate indifference to actions taken by nurse Majors, their subordinate. Pet. App. 33a, ¶ 11.

Stoneking was on remand from this Court in light of *DeShaney*. The court was required to consider whether Stoneking still had a viable § 1983 claim if the defendants did not have a duty to protect her. The court held that she did still have a viable claim, because she alleged that the defendants, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused her constitutional harm." *Id.* at 725. Similarly, in the instant case, even if the respondents are found not to have a duty to protect the patients at Vermillion County Hospital, the petitioners still have a viable claim because they alleged that the respondents established and maintained a policy, practice or custom which directly caused constitutional harm to the decedents and their next of kin. *See* Statement of the Case, p. 7.

Even if *DeShaney* is applicable to the instant case and Majors is considered a private, third party actor, the Court of Appeals of Indiana ignored an exception to the rule stated in *DeShaney*, which has been recognized by many of the federal circuits. This exception, often referred to as the state created danger exception, applies when the state creates a dangerous situation or causes a citizen to be more vulnerable to danger. *Stevens v. Umsted*, 131 F.3d 697 (7th Cir. 1997) concluded under the facts of the *Stevens* case that the state did not create a danger that would give rise to a duty to protect. However, *Stevens* is illustrative and instructive in its interpretation of the exception to *DeShaney*:

> We have also interpreted *DeShaney* as creating a second exception to the no duty to protect individuals from actions of private actors rule. We have stated that *DeShaney* "leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger." *Reed*[15], 986 F.2d at 1125 (*citing DeShaney*, 489 U.S. at 201, 109 S. Ct. at 1006. . . .)

Stevens v. Umsted, 131 F.3d 697, 704 (7th Cir. 1997) (footnote added).

Furthermore, the limitation of *DeShaney* was explained in *Horton v. Flenory*, 889 F.2d 454 (3d Cir. 1989):

> *DeShaney* certainly stands for the harsh proposition that even though state officials know that a person is in imminent danger of harm from a third party, the fourteenth amendment imposes upon those state officials no obligation to prevent that harm. *This holding is limited, however, to*

15. *Reed v. Gardner*, 986 F.2d 1122 (7th Cir.1993), *reh'g denied, cert. denied*, 510 U.S. 947 (1993).

> *situations in which the state is not involved in the harm, either as a custodian or as an actor.*

Id. at 457 (emphasis added).

How could the Court of Appeals of Indiana hold that the County was not involved when an employee of the County hospital was murdering patients on a recurring basis, at an epidemic level, over a two year period, when the County Health Officer had the ability, means, authority, and obligation to review, report, and stop those deaths? The County was clearly involved in the harm, both as a custodian and an actor. The County created a danger to the patients and rendered the patients more vulnerable to an existing danger. In several ways, the County placed the patients of Vermillion County Hospital in a position of danger which they would not have otherwise faced in several ways.

Nurse Orville Lynn Majors was rehired as an employee of Vermillion County Hospital although that county hospital had previously terminated him with a recommendation not to rehire him. Additionally, Vermillion County and the Commissioners of Vermillion County made a conscious decision not to prevent, stop, or even to review or investigate, the epidemic increase in deaths reoccurring at, Vermillion County Hospital. The County Health Officer purposely ignored his duties to abate wrongful health conditions within his county, to review the death charts and records, to report deaths to the state department of health, and to enforce the health laws of the State of Indiana. The County Health Officer rendered the patients of Vermillion County Hospital more vulnerable to danger and was involved in the harm, both as a custodian and an actor.

B. The County Health Officer Was The Official Policymaker Rendering The County Liable Under 42 U.S.C. § 1983 And The County Is Subject To Liability For Acts Occurring At The Hospital.

The decision of the Court of Appeals of Indiana is also in conflict with *Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 283 (7th Cir. 1986) which explained that "[t]he acts of a high-ranking official of a governmental entity may render the entity liable under § 1983 where the official is a policymaker whose conduct is in effect that of the governmental entity." *Malak* also explained:

> [A] governmental entity can act only through staff, and at a sufficiently high level the acts of officials are the acts of the governmental entity. The courts, including this one, have correctly concluded that when the conduct of a policymaker causes the alleged injury, that conduct may be fairly attributed to the governmental entity.

784 F.2d at 283 (citation omitted). As demonstrated by the statutory and factual analysis above, the County Health Officer was the policymaker for Vermillion County for matters of public health, who allowed the deaths to continue, over a two year period, at the county hospital. The County Health Department is statutorily mandated, and is responsible to the Board of Commissioners. I.C. § 16-20-1-2 (2003) and I.C. § 8-22-1-7 (2003). The County Health Officer is the *executive* of that County Health Department. I.C. § 16-20-2-16(d) (2003), and is charged with the various statutory duties, discussed above,[16] to protect the public health in the County.

16. As set forth previously, the County Health Officer's duties included to take all necessary actions to protect the public health, to abate wrongful health conditions within his jurisdiction, to collect, record and report all deaths within the County, and to enforce the health laws and regulations.

Just as importantly, the Board of Health, of which the County Health Officer is the *executive officer*, is statutorily authorized by I.C. § 16-20-5-6(7) (2003) to "[a]dopt rules necessary . . . to establish administrative policies and procedures," which is certainly the policymaking function for the County for matters of public health.

The evidence submitted to the trial court demonstrated that the County defendants, contrary to these direct duties to investigate, report, review, and prevent the recurring epidemic deaths at the Vermillion County Hospital, established a policy or custom of ignoring the cause, number, and the reasons for, patient deaths. This is the kind of governmental policy making which Congress was attempting to prohibit when it enacted § 1983.

The trial court correctly concluded that there were material issues of fact, precluding summary judgment, as to whether the County Commissioners, as the county executive, and the County Health Officer, were governmental actors or policymakers for Vermillion County Hospital. Pet. App. 34a, ¶ 12. The Court of Appeals of Indiana incorrectly reversed, deciding, as a matter of law, to the contrary. However, the evidence in this case is that for matters of public health, the County Health Officer's conduct is that of the governmental entity, and is attributed to the governmental entity. *Malak* is therefore applicable, contrary to the holding of the Court of Appeals of Indiana.

The Court of Appeals decision is also in conflict with *Milo v. Cushing Mun. Hosp.*, 861 F.2d 1194 (10th Cir. 1988). *Milo* examined the issue of due process at a municipally owned hospital. The Tenth Circuit assumed that the municipally owned hospital was acting under color of state law for purposes of *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

The issue in *Milo* was whether or not a private corporation, which had entered into an agreement to manage a municipally owned hospital, was a state actor. The court determined that the city had established a public trust to oversee the operations of the hospital. Thus, even under circumstances where the hospital had been contracted to a private corporation, there was sufficient public involvement to subject a private hospital corporation to § 1983 liability.

In the instant case, public health activity, by state statute, was controlled by, and the responsibility of, the County. The operation of the hospital was controlled by the Vermillion County Health Officer, a state actor who oversees public health policymaking functions of the County, including the County owned hospital. The County Health Officer was also in the unique position of having been the medical director of the Intensive Care Unit when the deaths were occurring, and the only member of the medical staff present at the Service of Medicine Committee meetings which was charged with the responsibility to review the death charts. As the Indiana State Board of Health concluded, the death charts were not reviewed as required.

Under both *Malak* and *Milo*, contrary to the holding of the Court of Appeals, the County Health Officer was the official policy maker of the County. As such, the County is liable under § 1983, and the County is subject to liability for the acts occurring at the hospital.

C. The Petitioners Have Asserted A Deprivation Of Constitutional Rights Necessary To Maintain A Claim Under 42 U.S.C. § 1983.

The opinion of the Court of Appeals of Indiana also conflicts with *Ancata v. Prison Health Services, Inc.*, 769 F.2d 700 (11th Cir. 1985) in which a personal representative brought a § 1983 civil rights action against the County, its sheriff, and the entity which provided medical care to county jail inmates. Ancata and the Court of Appeals concluded that the complaint sufficiently alleged deliberate indifference to the serious medical needs of Ancata on the part of medical personnel.

The court explained that if the County established or utilized a policy or custom that required the inmates to obtain court orders for medical assistance, and that policy or custom resulted in delaying treatment, or played a role in deliberate indifference shown to the prisoner, the county may be liable. Also, if the County permitted the sheriff and/or the prison health officials that it contracted with to establish the policy or custom, it may be liable. The liability would be a result of the County's own policy.

Like *Ancata*, petitioners have alleged, at minimum, deliberate indifference to the health needs and lives of the patients at Vermillion County Hospital by the County, Commissioners, and the County Health Officer. *See* Statement of the Case, p. 6. Under *Ancata*, the Civil Rights claim is a proper cause of action.

The County Health Officer was clearly acting under color of law. He was cloaked in the authority of the County in matters of public health, and had the duty to protect the public from the epidemic level of recurring suspicious deaths at a County facility. The County Health Officer's actions and

policy making authority subject the County to § 1983 liability. The County Health Officer was the only physician who attended the Service of Medicine Committee meetings which reviewed the deaths and had the knowledge of the operation of the ICU where nurse Majors worked and the deaths occurred. The County had, and assumed, a duty to protect the public from the actions of nurse Majors, and willfully failed to do so.

Finally, the Court of Appeals of Indiana's opinion is in conflict with *Kipps v. Caillier*, 205 F.3d 203 (5th Cir. 2000), *cert. denied*, 531 U.S. 816 (2000), in that petitioners specifically alleged a deprivation of the right to familial association, among other constitutional rights. Citing the United States Supreme Court case of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the federal court explained the right to familial association:

> In *Roberts*, the Court noted that the right to intimate association, the freedom to choose "to enter into and maintain certain intimate human relationships," is a "fundamental element of personal liberty." 468 U.S. at 617-18, 104 S. Ct. 3244. At the foundation of this right to intimate association are family relationships:
>
> > Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.
>
> . . . .

> *Roberts*, 468 U.S. at 619-20, 104 S. Ct. 3244 (emphasis added); *see also McCabe v. Sharrett*, 12 F.3d 1558, 1563 (11th Cir. 1994) ("At a minimum, the right of intimate association encompasses the personal relationships that attend the creation and sustenance of a family.") (emphasis added). Supreme Court precedent with respect to intimate association can be synthesized as a continuum with "family relationships" at one end, receiving the most protection, and arms length relationships, like a business acquaintance, at the other end, "remote from the concerns giving rise to this constitutional protection." *Roberts*, 468 U.S. at 620, 104 S. Ct. 3244.

205 F.3d at 205.

Deprivation of the right to familial association, as well as the rights to life, liberty, and property, have been adequately asserted by Petitioners. *See* Statement of the Case, p. 7. Thus, the decision of the Court of Appeals of Indiana is in conflict with *Kipps*, *supra*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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